# Ward v Malaysian Airlines System Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-1-1991
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND HARUN HASHIM SCJJ
22 AUGUST 1991

*Damages (Personal Injury or Death) — Assessment — Appeal against award — Award must be shown to be wrong in principle or unreasonable — Residual disability — Entitlement to interest on general damages and costs*

*Damages (Personal Injury or Death) — Insurance benefits — Whether sum received from insurance policy under a general accident policy can be deducted from award — Civil Law Act 1956, s 28A(1)(a)*

In this case the appellant, an Australian national who was employed by the respondents as a pilot, suffered a head injury and other minor injuries as a result of an emergency crash landing of the aircraft he was piloting in Sarawak. Liability for damages was admitted and only the issue of the quantum of damages was before the High Court. The learned trial judge in his judgment (see [1991] 3 MLJ 124) assessed damages for the appellant in the total sum of $301,250.

The learned judge then ordered a deduction of $300,000 which the appellant had received from an insurance company under a general accident policy taken by the respondents for the benefit of the appellant and other employees under the terms of their contract of employment, thereby leaving a judgment sum of only $1,250. The learned judge also ordered interest at 4% pa on the judgment sum of $1,250 from the date of the accident to the date of judgment, and thereafter at 8% pa from the date of judgment to the date of realization, which would appear to represent the interest sought for special damages. He further ordered each party to bear its own costs.

The appellant appealed (a) against the findings of fact on quantum of damages; (b) on the legality of the deduction of $300,000 from the accident insurance policy taken by the respondents; and (c) against the refusal of the learned judge to order interest on general damages and costs.

**Held,** allowing the appeal in part:

(1) The appellant has failed to show that the assessment of damages by the learned judge in the High Court was wrong in principle and/or wholly unreasonable. Accordingly, the court confirmed the assessment made by the learned judge. The award of $60,000 for pain and suffering erred, if at all, on the side of generosity and whatever residual disability suffered by the appellant which the learned judge might have omitted, would be sufficiently covered by that award.

(2) In this case, having regard to the nature of the scheme of the insurance policy, the insurance benefits were not deductible both under s 28A(1)(a) of the Civil Law Act 1956 and the common law itself. The appeal is allowed to this extent and judgment should therefore be entered for the appellant on the full assessment sum of $301,250.

(3) It followed that the appellant should also be entitled to interest at 8% on the general damages from the date of service of the writ of summons to the date of judgment as well as costs, both in the High Court and in the Supreme Court, in addition to interest on special damages ordered in the High Court on the sum of $1,250.

**[Bahasa Malaysia summary**

Di dalam kes ini perayu, seorang warganegara Australia yang telah bekerja dengan penentang sebagai juruterbang, telah mengalami kecederaan di kepalanya dan lain-lain kecederaan kecil akibat dari pendaratan kecemasan kapalterbang yang dipandunya di Sarawak. Liabiliti untuk membayar ganti rugi telah diakui dan hanya soal kuantum ganti rugi ditimbulkan di Mahkamah Tinggi. Hakim yang arif di dalam penghakimannya (lihat [1991] 3 MLJ 124) telah mentaksir ganti rugi sebanyak $301,250.

Hakim yang arif kemudiannya memutuskan potongan $300,000 yang telah diterima oleh perayu dari syarikat insurans di bawah polisi kemalangan am yang diambil oleh penentang untuk faedah perayu dan lain-lain pekerja di bawah kontrak pekerjaan mereka, dan oleh kerana itu meninggalkan baki $1,250. Hakim yang arif mengenakan faedah sebanyak 4% setahun dari tarikh kemalangan hingga tarikh keputusan dibuat dan 8% setahun dari tarikh keputusan hingga tarikh pembayaran atas baki itu yang nampaknya mewakili faedah untuk ganti rugi khas. Beliau selanjutnya mengarahkan tiap-tiap pihak menanggung kos masing-masing.

Perayu merayu (a) terhadap pendapat fakta mengenai kuantum ganti rugi; (b) mengenai kesahan pemotongan $300,000 dari polisi insurans kemalangan yang diambil oleh penentang; dan (c) terhadap keengganan hakim yang arif memberi faedah atas ganti rugi am dan kos.

**Diputuskan,** membenarkan sebahagian daripada rayuan itu:

(1) Perayu telah gagal menunjukkan bahawa taksiran ganti rugi oleh hakim yang arif di Mahkamah Tinggi adalah salah pada prinsipnya dan/atau sama sekali tidak munasabah. Oleh kerana itu, taksiran yang dibuat oleh hakim yang arif hendaklah disahkan. Award sebanyak $60,000 bagi kesakitan dan penderitaan, jika tersilap pun, telah tersilap dari kemurahan hati dan apa-apa baki kecatatan yang dialami oleh perayu yang mungkin dilangkaukan oleh hakim yang arif, boleh dirangkumi oleh award itu.

(2) Di dalam kes ini, memandangkan sifat skim polisi insurans itu, faedah insurans itu tidak boleh dipotong daripada taksiran ganti rugi di bawah s 28A(1)(a) Akta Undang-Undang Sivil 1956 dan juga di bawah 'common law' sendiri. Rayuan dibenarkan setakat itu dan penghakiman hendaklah diberi bagi jumlah taksiran sepenuhnya, iaitu $301,250.

(3) Oleh kerana itu, perayu berhak mendapat faedah sebanyak 8% dari tarikh penyampaian writ saman hingga tarikh keputusan dan juga kos, di Mahkamah Tinggi dan juga di Mahkamah Agung, bersama dengan faedah atas ganti rugi khas, iaitu $1,250, yang telah diperintahkan di Mahkamah Tinggi.]

**Cases referred to**

1 *Tominam bte Tukimin* v *Toh Kai Chup* [1985] 2 MLJ 345 (distd)
2 *Mak Sik Kwong* v *Minister of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175 (refd)
3 *Bradburn* v *Great Western Railway Co* (1874) LR 10 Ex 1; [1874-80] All ER 195 (refd)
4 *Parry* v *Cleaver* [1967] 3 WLR 739, CA; [1970] AC 1 (refd)
5 *Hussain* v *New Taplow Paper Mills Ltd* [1988] 2 WLR 266; [1988] 1 All ER 541 (distd)
6 *Nabi* v *British Leyland (UK) Ltd* [1980] 1 WLR 529; [1980] 1 All ER 667 (distd)

**Legislation referred to**

Civil Law Act 1956 s 28A(1)(a)

**Appeal from:** Civil Suit No P 165 of 1984 (High Court, Kuala Lumpur)

*RK Nathan* for the appellant.
*Dato' Ronald Khoo* (*S Radhakrishnan* with him) for the respondents.

*Cur Adv Vult*

**Mohamed Azmi SCJ** (delivering the judgment of the court): The appellant's claim is for damages for personal injuries and consequential loss suffered by him and caused by the negligence and/or breach of duty on the part of the respondents ('MAS'), their servants or agents. He also claims interests on general damages at the rate of 8% pa from the date of service of the writ of summons to the date of judgment, and on special damages at the rate of 4% pa from the date of accident to the date of judgment or payment, and costs.

The appellant, an Australian national, was at all material times employed by MAS as a pilot in the East Malaysia Rural Air Services operating in Sabah and Sarawak. In addition to the Rural Air Services using twin and single engine aircrafts, it is a well-known fact that MAS operate both international and domestic airline passenger and cargo services using modern planes including 737B and 747 Jumbo jets for overseas destinations.

It is not in dispute that on 6 July 1982 the appellant, aged 42 years, was the pilot of a Norman Islander ('BN2') aircraft flying from Long Somado to Lawas in the Fifth Division of Miri, Sarawak, when the said aircraft developed engine trouble causing the appellant to make an emergency crash landing on a football field at Long Bayu near Lawas. As a consequence, the appellant suffered a head injury and other minor injuries.

At the hearing in the High Court on 8 February 1990, MAS through their counsel, Dato' Ronald Khoo, admitted 100% liability; thus only the issue of quantum of damages both general and special, was left to be determined by the High Court. To save time and costs, an agreed bundle of documents was put in consisting of:

(i) 'AB1' Dr Bala Ratnam's medical report.
(ii) 'AB2' Dato' (Dr) Arumugasamy's medical report.
(iii) 'AB3' Overseas related medical report.
(iv) 'AB4' Related correspondence with defendants (respondents) and Civil Aviation.
(v) 'AB5' Documents relating to Department of Social Security (Perth) Australia.
(vi) 'AB6' Documents relating to salary and payslips.
(vii) 'AB7' Bundle of documents relating to the plaintiff's (appellant's) employments.
(viii) 'AB8' Appellant's (plaintiff's) flight licences.
(ix) 'AB9' Australian Industrial Relations Commission Report.

The appellant gave evidence and called a witness in the person of Mr William Alan Douglas ('PW1'), a clinical psychologist from Fremantle, Australia, who gave expert evidence on residual damage caused by the head injury based on various tests, including IQ tests. MAS called one witness, Capt Hj Mohd Kamil bin Hj Abu Bakar ('DW1'), a chief pilot attached to their security division.

In a 41-page written judgment [see [1991] 3 MLJ 124], the learned judge assessed damages for the appellant as follows:

| | |
|---|---|
| (a) General damages for pain and suffering | $ 60,000 |
| (b) Pre-trial loss of earnings | |
| (i) $4,000 per month from the month of August 1983 to July 1985, ie 24 months | $ 96,000 |
| (ii) $2,000 per month from August 1985 to February 1990, ie 55 months | $110,000 |
| (c) Post-trial loss of earnings $2,000 per month for 17 months | $ 34,000 |
| (d) Special damages with interest at 4% pa from date of accident, ie 6 July 1982 to date of judgment and thereafter further interest at 8% from date of judgment to date of realization | $ 1,250 |
| | $301,250 |

The learned judge then ordered a deduction of $300,000 which the appellant had received from an insurance company under a general accident policy taken by MAS for the benefit of the appellant and other employees under the terms of their contract of employment, thereby leaving a judgment sum of only $1,250. The learned judge also ordered interest at 4% pa on the judgment sum of $1,250 from the date of the accident to date of judgment, and thereafter at 8% pa from the date of judgment to the date of realization, which would appear to represent the interest sought for special damages. He further ordered each party to bear its own costs.

In the memorandum, the appellant set out 18 grounds of appeal, but from the submission made by his counsel, Mr RK Nathan, criticism against the judgment of the learned judge may be conveniently classified under three heads. Firstly, the appeal is against the findings of fact on quantum of damages. Secondly, the appeal concerns the legality of the deduction of $300,000 from the accident insurance policy taken by MAS, and lastly, the appeal is against the refusal of the learned judge to order interest on general damages and costs. In our view, the outcome of the last head of complaint must necessarily follow the event of this appeal.

On quantum of damages, there was no dispute that under pain and suffering, the only main injury to be

seriously considered was the head injury of the appellant. Mr RK Nathan submitted that the judge was wrong in rejecting the opinion of PW1 on his psychological evaluation of the appellant. Since the medical reports of Dr Bala Ratnam and Dato' (Dr) Arumugasamy relied upon by MAS merely touched on neurological evaluation, it is submitted that the judge ought to have accepted the psychological evaluation made by PW1 — the only psychologist who gave evidence at the trial. According to PW1, he conducted IQ and other tests on the appellant about three years after the accident and found, inter alia, a gap between the appellant's verbal IQ level and his performance IQ level. According to him, the appellant's brain impairment, caused by the head injury was quite severe. The practical effect of the damage reduced the speed of his information processing ability. He showed a clear inability to plan or organize problem-solving strategies in any logical and consistent way. Although his memory of verbal material was within normal limits, his long term memory showed a deterioration of approximately 25%. In PW1's opinion, these impairments would be permanent. He examined the appellant again in July 1989, and his assessment confirmed that the appellant's neuro-psychological impairments were permanent. It is also confirmed by the appellant's failure to pass his matriculation studies. According to Mr RK Nathan, if the learned judge had accepted PW1's uncontradicted findings, he would have assessed damages for pain and suffering at $90,000 instead of $60,000, based on the case of *Tominam bte Tukimin* v *Toh Kai Chup*.[1] In that case a 25-year-old plaintiff sustained a very severe head injury resulting in poor memory and concentration. She was awarded a total sum of $90,000 as damages for pain and suffering. But we note that in that case, the plaintiff also suffered epileptic fit as a result of the brain damage, which to a greater extent required medication all her life. There, the court awarded $45,000 for pain and suffering for brain injuries and loss of amenities and $12,000 for epilepsy. Dato' Ronald Khoo for the respondents correctly pointed out that based on the authority of *Tominam*,[1] the award of $60,000 in this case should not be held to be inadequate. We agree with him. In rejecting PW1's opinion, the learned judge commented adversely on his psychological evaluation because of failure to take into account the appellant's academic qualification when carrying out the IQ test. Notwithstanding the fact that the appellant is a self-made man who has risen from the ranks, we are of the view that the learned judge's criticism of PW1's opinion is not completely unjustified. In any event, since *Tominam*'s case[1] is the cornerstone of the appellant's argument, the award of $60,000 for pain and suffering erred, if at all, on the side of generosity, and whatever residual disability suffered by the appellant which the learned judge might have omitted, would be sufficiently covered by that award.

On loss of earnings, the three main complaints against the assessment of damages are firstly, in respect of awarding only 50% loss from the fourth year, ie August 1985 to February 1990 on account of mitigation of damage; secondly, in taking Malaysian 55 years as the retiring age instead of Australian 65 years; and lastly, in refusing to apply Ansett Airlines of Australia (Pilots) Award 1989.

On the loss of 50% earnings applied by the judge, Mr RK Nathan argued that the appellant is now receiving financial assistance from the Social Security Department of Australia. If he were to find a job, he would be penalized, and as such he cannot mitigate his damage. On the other hand, it is not seriously challenged that the appellant is not a vegetable as a result of that unfortunate accident, and that on the fourth year of the accident, he is capable of finding a job albeit of lesser standing than an airline pilot, such as a mechanic, a profession which he successfully held before becoming a commercial pilot in 1965.

The thrust of Mr RK Nathan's argument is that the tortfeasor must take his victim as he finds him. Whilst we appreciate the existence of that principle, it cannot be extended to mean that in assessing damages, the court is compelled to apply foreign law and norms in assessing damages in this country. As argued by Dato' Ronald Khoo, such an approach would lead to absurdity and uncertainty in our law if awards of damages were to fluctuate greatly depending on the social security law and level of affluence of the injured person's country. If a person happens to injure negligently a millionaire or a person with a weak heart, then the tortfeasor must take him as he is, irrespective of the country he comes from. The relevant factor is the injured person himself, not his country or the law governing social security or other domestic rules applicable to his country. As such the learned judge was justified in the circumstances in reducing his loss of income by 50% from the fourth year of the accident.

For the same reason, the judge did not err in law in applying 55 years as the retiring age of the appellant instead of 65 years. Finally, it must be observed that there is no evidence at all before the court below that the appellant has ever been employed by the Ansett Airlines of Australia; nor is there evidence that the Ansett Airlines of Australia (Pilots) Award 1989 is applicable to all airlines in Australia. Foreign law on any particular topic is a question of fact which is to be proved by evidence of an expert: *Mak Sik Kwong* v *Minister of Home Affairs, Malaysia (No 2)*[2] at p 180. In the circumstances, the learned judge was perfectly entitled in refusing to apply the Ansett award in this particular case. Finally, before going to the next point, it must be remembered that, at all material times, the appellant has never been employed as a pilot to fly 737

or 747 aircraft. To be such a pilot, one must have the necessary flying hours as a co-pilot in that type of aircraft. At the time of the accident, it was common ground that he was only engaged as a pilot to fly BN2 or such similar class of light aircraft, and in our view for future loss it is too remote to consider him on the basis of a 737 jet pilot having regard to his age, academic qualification and his actual past record as a light aircraft pilot, notwithstanding the solitary and abortive offer received by him from an African airline to fly bigger aircraft, before he joined MAS.

Taking the evidence as a whole, we are unable to disturb the findings of fact made by the learned judge, and sitting as an appellate court, we cannot substitute our own assessment for that of the High Court, unless it is shown to our satisfaction that the assessment is wrong in principle and/or wholly unreasonable. In our view, the appellant has failed to do so, and we accordingly confirm the assessment of damages made by the learned judge.

On the issue of deductibility under the second head, s 28A(1)(a) of the Civil Law Act 1956 provides:

> (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account —
>
> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;

Mr RK Nathan, in his argument, urges this court not to limit the interpretation of this provision to insurance policies the premiums of which are paid by the injured person. On behalf of the respondents, it seems to be suggested that English authorities would only exclude deductibility in cases where the premiums are paid for by the injured person. Thus, in *Bradburn* v *Great Western Railway Co*[3] which was considered in *Parry* v *Cleaver*,[4] it was held that in an action for injuries caused by the defendant's negligence, a sum received by the plaintiff on an accident insurance policy (which he had paid for) cannot be taken into account in deduction of damages.

In ordering the deduction, the learned judge relied principally on the House of Lords case of *Hussain* v *New Taplow Paper Mills Ltd*[5] and *Nabi* v *British Leyland (UK) Ltd.*[6] It would appear that, on the question of deductibility, His Lordship applied the simple test of who paid for the premiums of the insurance policy. We regret to say that the law in England on deductibility is not that simple. In fact, there the law on this subject is so unsettled that Parliament has intervened with a compromise solution by providing in some instances that half of a certain payment, over a period, can be deducted in assessing the loss, for example, s 2 of the Law Reform (Personal Injuries) Act 1948. But this type of solution is not open to any court where the statute is silent. The guiding principle governing decision in border line situations is that, 'The common law has treated this matter as one depending on justice, reasonableness and public policy' (per Lord Reid in *Parry* v *Cleaver*[4] at p 13).

It should be noted that in *Hussain*'s case,[5] the deduction allowed was in respect of payment of full 'sick pay' paid by the employers to the injured employee in accordance with the terms of his contract of employment for the first 13 weeks after the accident, under a 'permanent health insurance scheme' to which employees, like Hussain, were not required to contribute. The employers were reimbursed for any payment made under the scheme under an insurance policy taken out by them with the insurers. Although the 'sick pay' payable under the scheme was contractual in nature between the plaintiff and the employers, the salient points to be observed are that, firstly, the deduction in *Hussain*'s case[5] and as well as in *Nabi*'s case,[6] related only to the award of damages for the plaintiff's loss of earnings and not to damages for pain and suffering. Secondly, the nature of payments of the 'sick pay' payable under the scheme under the contract of employment were the very opposite of a pension, which was payable only after employment has ceased. It was also held that the fact that the employers took the precaution to insure their liability under the scheme, and would be reimbursed of all payments made under the scheme, did not affect the issue in that particular case. On the other hand, in *Nabi*'s case[6] it was held that in the absence of statutory provision to the contrary, unemployment benefit received by the injured employee under s 12(1)(a) of the Social Security Act 1975 was deductible from damages for loss of earnings although contributions were made both by his employer and himself.

What are the facts in the present appeal? As can be observed, even under the common law it is necessary to consider the nature of the benefits paid or payable under the insurance policy to determine, inter alia, whether the money received by the appellant is under a purely personal insurance policy or by way of benefit arising out of his employment. Consideration should also be given to whether the benefit is analogous to wages or to pension. It is not in dispute that under the terms of the contract of employment between MAS and the appellant, the former are obliged to take out personal insurance policy to cover all their pilots and certain other category of employees in case of death or permanent disablement. The insurance money is payable by the insurers direct to the injured pilot irrespective of negligence on the part of anyone, or whether the fatal or permanent injury is caused by riots, civil commotion or war risks.

Under the Terms and Conditions of Employment of Temporary Pilots 1981, cll 1 and 3 of the Second Schedule provide as follows:-

Second Schedule

Service Benefits And Allowances

| | | |
|---|---|---|
| Personal accident insurance | 1 | A pilot employed by the company will be insured against death or permanent disablement for an amount that will be determined by the company from time to time. Such insurance cover shall be on a 24-hour basis and will include death or permanent disablement resulting from riots and civil commotion as well as war risks whether or not war has been declared. |
| | 2 | ... |
| Loss of licence insurance | 3(1) | The company will effect, at its own expense, insurance on behalf of each pilot in its employ against loss of his licence on medical grounds. |
| | (2) | The insurance cover to be provided under para (1) of this clause will be $220,000 for co-pilots and $300,000 for captains, provided that the company shall not [sic] bound to effect such cover if such cover is not obtainable in the London market in which event, the company will effect insurance cover up to such maximum sum as is available. |

There is no dispute that under cl 1 of the said personal accident policy, the appellant has received $300,000 from the insurers (Malaysian National Insurance Sdn Bhd) and, in addition, he has also received another $300,000 under cl 3 for the loss of his pilot licence. Admittedly, deduction is not sought by MAS in respect of payment under cl 3.

Unlike *Hussain*'s case,[5] the benefits payable under the policy in this appeal are obviously not intended to reimburse MAS of payments made by them to their employees under the terms and conditions of the contract of employment. In our opinion, the insurance cover is a service benefit contractually granted by MAS to their pilots on termination of their services arising from death or permanent disability. It is analogous to pension or gratuity and therefore should not be deducted. To be deductible, the contractual payment should be analogous to wages such as 'sick pay' in *Hussain*'s case,[5] or statutory unemployment benefits as in *Nabi*'s case.[6] Here, the insurance payment cannot possibly be treated as if MAS continued to pay part of the appellant's wages after the accident to support the argument against double payment. The loss of earnings, past and future, that the appellant is entitled under the Civil Law Act 1956, which is caused by the negligence of MAS, should not be diminished by such contractual benefits which are analogous to lump sum pension or gratuity even under the common law. Further, although MAS is paying the premium under the contract of employment, the appellant's services given under it form the reward (equivalent to a premium) which entitles him to the benefit. As alluded to earlier, it is a form of lump sum pension or gratuity payable in the event of his death or permanent disability when employment has ceased.

To put the issue of deductibility beyond doubt in the present appeal, our Parliament has, fortunately for the appellant, introduced s 28A(1)(a) by Act A308 which came into force on 30 May 1975. The intervention of the new provision goes beyond introducing mere compromise solution against deductibility. We agree with Mr RK Nathan that the plain meaning of the words used in that section should be adopted for the purpose of interpretation. Adopting the strict rule of interpretation, our Parliament in its wisdom has made it crystal clear that any sum paid or payable in respect of personal injury which does not result in death 'under any contract of assurance or insurance' shall not be taken into account in assessing damages. By providing no exception, the effect would be to eliminate altogether deductibility even in border line situations although the injured person has not directly contributed to the insurance scheme.

For the above reasons, it is our opinion that having regard to the nature of the scheme of the policy, the insurance benefits in this case are not deductible both under s 28A(1)(a) and the common law itself. The appeal is allowed to this extent and judgment should therefore be entered for the appellant on the full assessment sum of $301,250. Following this event, the appellant should also be entitled to interest at 8% on general damages from the date of service of the writ of summons to the date of judgment, as well as costs, both here and below, in addition to interest on special damages already ordered in the High Court on the sum of $1,250.

*Appeal allowed in part.*

Solicitors: *RK Nathan & Co; Shearn Delamore & Co.*

Reported by *Prof Ahmad Ibrahim*